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IN THE

Supreme Court of the United States

PIRELLI ARMSTRONG TIRE CORPORATION,
Petitioner,

v.

CLAY K. JAMES, *et al.*,
Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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Contrary to respondents' brief in opposition, the Sixth Circuit's decision did not make findings of fact or hold that any of the trial court's findings were clearly erroneous. Rather, the Sixth Circuit applied a broad rule of law that swept up and determined the cases of twenty-one respondents as a matter of law. The sweeping impact of the Sixth Circuit's decision places it in conflict: (i) with other circuits that have declined to interpret descriptions of future benefits under a plan then in effect as implicit promises never to change those benefits, even if the reservation of rights to make future changes is not reiterated, and (ii) more broadly, with those circuits that have held that an ERISA administrator need not disclose even active internal consideration of a potential future plan change until the change is under "serious consideration." By finding that Pirelli's statements

regarding future benefits under its welfare plan were misleading as a matter of law, the Sixth Circuit has joined the few other circuits that have held or permitted a jury to find that a description of future benefits is a misrepresentation if the administrator does not affirmatively assert the employer's right to modify the plan. Because the decision aggravates the already difficult task of administering an ERISA plan, creates new obligations for plan fiduciaries, and undermines the policies and goals of ERISA, the Court should grant Pirelli's petition for writ of certiorari.

REASONS FOR GRANTING THE PETITION

I. THE SIXTH CIRCUIT HELD THAT PIRELLI BREACHED ITS FIDUCIARY DUTY AS A MATTER OF LAW.

Respondents incorrectly argue that the case is fact specific because it turns on "findings of fact by the Sixth Circuit." Br. Opp. 5. Federal circuit courts do not have the power to make fact findings—only district courts do[1]—and when the court of appeals held that Pirelli breached its fiduciary duty to respondents, it made that ruling as a matter of law, not fact.

At trial, the district court made a fact finding that "[i]n the present case, like *Sprague*, Defendant's statements to Plaintiffs that they would retain their medical benefits 'for life' were true under the terms of the then-existing plan." Pet. App. 45a-46a. The district court distinguished between

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[1] "In applying the clearly erroneous standard to the findings of a district court sitting without a jury, appellate courts must constantly have in mind that their function is not to decide factual issues *de novo*." *Anderson* v. *City of Bessemer*, 470 U.S. 564, 573 (1985). The Sixth Circuit in this case did not reverse any finding of fact or even mention FED. R. CIV. P. 52(a) ("Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses.").

Fitzsimmons and Jarrard and respondents because it found that Shirley Pike erroneously told those two—and only those two, in response to their questions about the reservation of rights language in the summary plan description—that Pirelli could not change the plan. Pet. App. 46a. In reversing the district court's judgment, the court of appeals did not specifically reject these or any of the district court's other factual findings as clearly erroneous; nor did the court remand for a new trial of any liability issue.

Instead, the court of appeals held that Pirelli's communications with each and every plaintiff breached its ERISA fiduciary duty because Pirelli's statements that the benefits under its welfare plan would continue for life or throughout retirement were, as a matter of law, inaccurate or misleading statements about Pirelli's right to change the plan. Pet. App. 27a. In other words, notwithstanding the fact that the plan then in effect undisputedly provided a consistent and unchanging level of benefits to retirees for the rest of their lives, the court of appeals held that Pirelli's descriptive statements to that effect were inaccurate and misleading as a matter of law. Pet. App. 28a. The court of appeals' holding that Pirelli breached its fiduciary duty as a matter of law imposes strict liability for an accurate statement of benefits and thus ineluctably requires a fiduciary to additionally explain the reserved right to amend the plan. That explanation is not required in most other circuits or by the Court's precedent.

II. THE DECISION DEEPENS A CIRCUIT SPLIT ON THE DUTY OF EMPLOYERS TO DISCLOSE THE MERE POTENTIAL FOR PLAN CHANGES.

Because the court of appeals' holding reaches each and every plaintiff, it cannot be read any narrower than holding that an oral description of future benefits as lasting "for life," even if accurate under the terms of the plan, is as a matter of

law an inaccurate representation that the employer cannot or will not change the plan. On its face, the decision conflicts with *Frahm* in holding that oral descriptions of benefits as lasting "for life" or as "lifetime" communicates that an employer does not have the power to change the plan. *See Frahm* v. *Equitable Life Assurance Soc'y of United States*, 137 F.3d 955, 959-60 (CA7 1998). Respondents' attempt to distinguish *Frahm* on the basis that the administrator in *Frahm* had only sporadically described the benefits as "lifetime," Br. Opp. 10, is untenable.

In addition to standing in direct contrast with *Frahm*, the court of appeals made the same mistake the Third Circuit made in *In re Unisys Corp. Retiree Med. Benefit ERISA Litig.*: it held that the phrases "for . . . life" or "lifetime" indicate that the employer has surrendered its right to change or alter the plan, even though the same phrases were accurately used to describe how long benefits would last. 57 F.3d 1255, 1259, 1265 (CA3 1995). Neither case explains why the phrase "for life" indicates the plan cannot be changed when other terms used to describe the duration of future benefits do not. *Id.* Indeed, there is no reason that it should, and hence no reason to limit the application of the decision below to plan descriptions using the words "lifetime" or "for life."

Under the Sixth Circuit's decision, unlike *Frahm*, if an administrator of a plan that provides retiree benefits until death answers the question "how long does the retirement plan provide benefits for?" with "for life," the administrator will effectively lose its statutory right to alter the plan. *See* Pet. App. 27a. Likewise, if an administrator of a plan that provides retiree benefits for five years answers the same question with "five years," that administrator will not be able to alter the plan within that five-year period without risking litigation. The decision makes an accurate description of the duration of future benefits under a current plan a representation that those benefits cannot or will not be changed.

In effect, then, the decision imposes a duty to accompany any description of future plan benefits with a repetition of the employer's right to alter the plan. Otherwise, there is no way for the employer to conclusively demonstrate that its statements were a description of future benefits under the plan and not a gratuitous promise not to change the plan. By effectively creating that burden, the decision creates a conflict with other circuits' carefully tailored holdings allowing an employer to describe future benefits without repeating the reservation of the right to change the plan and, indeed, expressly not requiring discussion of even potential plan changes unless those changes are under serious consideration.

This split has more than theoretical consequences. An employer with a plan like Pirelli's located in the Eighth Circuit, for example, when asked about the duration of post-retirement benefits under its plan, could answer "for life" without losing its right to later alter the plan. Even if the employer was (not yet seriously) considering shortening the term of benefits at the time, the fact that a statement about the future of the plan was made without a restatement of the employer's right to change the plan would not make the statement a breach of the administrator's fiduciary duty. *See Wilson* v. *Southwestern Bell Tel. Co.*, 55 F.3d 399, 404-05 (CA8 1995) (holding that employer's statement that it "absolutely will not enrich the plan" did not lead to a breach of fiduciary duty when it later changed the plan); *see also Mushalla* v. *Teamsters Local No. 863 Pension Fund*, 300 F.3d 391, 396 (CA3 2002); *Fischer* v. *Phila. Elec. Co.*, 96 F.3d 1533, 1539 (CA3 1996); *Bins* v. *Exxon Co. U.S.A.*, 220 F.3d 1042, 1049 (CA9 2000) (*en banc*); *Hockett* v. *Sun Co., Inc.*, 109 F.3d 1515, 1523 (CA10 1997); *Barnes* v. *Lacy*, 927 F.2d 539, 544 (CA11 1991). But in the Sixth Circuit, the same answer to the beneficiary would conclusively establish that the employer had breached its fiduciary duty if it later

shortened the term of benefits, even if no change was even remotely contemplated at the time.

The rule applied by the Sixth Circuit in deciding this case cannot coexist with the numerous decisions adopting the "serious consideration" rule because the Sixth Circuit imposed strict liability for a plan description that the "serious consideration" rule would have absolutely protected. Respondents erroneously argue that *Wilson* and the other serious-consideration cases are distinguishable because, in those cases, the beneficiaries asked whether the employer intended to change the plan before they asked whether it could change the plan. Br. Opp. 11. But no court ever made a finding that the plaintiffs (with the exception of Jarrard and Fitzgerald, who prevailed below) asked whether the plan could be changed, or that Pirelli told them it could not: the district court found the opposite. Pet. App. 45a. The court of appeals' decision to avoid the impact of those findings by applying a rule of strict liability deepened the conflict with the holdings of other circuits by eliminating the factual distinctions that might have served to narrow application of the decision to limited circumstances.

III. THE SIXTH CIRCUIT'S DECISION UNDERMINES THE POLICIES BEHIND ERISA.

Respondents inaccurately assert that the Sixth Circuit's decision will no more undermine the policies behind ERISA than *Unisys*, decided more than eight years ago. Br. Opp. 15. In *Unisys*, however, the word "lifetime" and other similar phrases were contained in the summary plan description as well as in other verbal and written communications. 57 F.3d, at 1259-60. In this case, on the other hand, the oral communications are the only ones upon which plaintiffs rely. The court of appeals' holding thus presents a risk that *Unisys* did not—that a beneficiary (or would-be beneficiary) could entirely skirt ERISA's written-plan requirement by asserting

that an oral statement had modified or waived the employer's ability to later change the plan. Moreover, *Frahm* and the serious-consideration cases decided in the interim had implicitly disregarded the core of *Unisys*, but the Sixth Circuit's decision in this case has reinvigorated that theory of liability and solidified the conflict among the circuits.

Allowing breach-of-fiduciary-duty lawsuits based on a failure to repeat a written reservation of rights greatly expands the limited exception to the written-plan requirement that the Court recognized in *Varity Corp.* v. *Howe*, 516 U.S. 489 (1996). The risks of miscommunication—and hence unpredictability—are greatly reduced when both beneficiaries and administrators understand that the written plan documents are definitive. *Cf. Moore* v. *Metro Life Ins. Co.*, 856 F.2d 488, 492 (CA2 1988) ("Were all communications between an employer and plan beneficiaries to be considered along with the SPDs as establishing the terms of a welfare plan . . . [p]redictability as to the extent of future obligations would be lost.").

If this decision is not reversed, ERISA's writing requirement will be severely undermined, employers will be unable to accurately predict their ERISA obligations, and, ultimately, employers will be less willing to provide welfare plans or to permit verbal descriptions of future plan benefits.

CONCLUSION

For all of these reasons, and those stated in the petition, the Court should grant the petition for writ of certiorari.

Respectfully submitted,

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